

[Counsel identified on signature page]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

EOLAS TECHNOLOGIES  
INCORPORATED,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

Case No. 4:17-cv-03022-JST

Related to Case Nos. 4:17-cv-01138-JST,  
4:17-cv-03023-JST, and 4:15-cv-05446-JST

**JOINT CASE MANAGEMENT  
STATEMENT**

Date: June 8, 2021  
Time: 2:00 p.m.  
Courtroom: Courtroom 6, 2nd Floor  
Judge: Hon. Jon S. Tigar

Pursuant to this Court's January 28, 2020 Scheduling Order (Dkt. 567)<sup>1</sup>, including continuations entered by the Court (Dkts. 630, 638, 646, 648, 650, 652, 654, 658), and the Court's February 27, 2020 order (Dkt. 576), the parties to these cases, by their respective counsel, respectfully submit the following Joint Case Management Statement in anticipation of the Further Case Management Conference scheduled for June 8, 2021. This Joint Case Management Statement omits a number of the sections required by the Standing Order for All Judges of the Northern District of California to focus on the issues most pertinent to next steps for these cases. The parties have previously filed more fulsome Joint Case Management Statements in the individual cases, which more clearly set out the parties' respective positions on all sections from the Standing Order.

# **1. LEGAL ISSUES**

## **a. Eolas's Statement**

The legal issues in dispute are those in Eolas's complaint (including supplements thereto) and the Defendants' answers (including supplements thereto). At a high level, and given the advanced procedural posture of this case, the issues to be decided are narrow. They are:

- Whether each Defendant infringes one or more claims of the '507 patent as Eolas asserts;
- Whether one or more claims of the '507 patent is invalid as Defendants assert; and
- If Amazon, Google, and/or Walmart are found to infringe one or more claims of the '507 patent that is or are not invalid, the appropriate damages.

## **b. Amazon's, Google's, and Walmart's Statement**

The legal issues in dispute are those identified by Eolas, as well as those in any of the Defendants' counterclaims. Amazon, Google, and Walmart reserve the right to raise additional issues that may arise through the course of these actions. At present, the following legal issues are disputed:

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<sup>1</sup> Docket entries cited herein are to Case No. 4:17-cv-3022-JST unless otherwise noted.

- Whether any Defendant infringes one or more of asserted claims 19, 24, 26, 32, 37, 39, and 45 of the '507 patent;
- If any Defendant infringes a valid and enforceable asserted claim of the '507 patent, the amount of damages adequate to compensate Eolas for the infringement;
- Whether the asserted claims of the '507 patent are invalid also because they fail once again to satisfy the conditions for patentability specified in Title 35 of the U.S. Code, including sections 101, 102, 103, and/or 112;
- Whether the asserted claims of the '507 patent are invalid because the term of the '507 patent was improperly extended or adjusted under 35 U.S.C. § 154, or because of improper inventorship (§ 256) or derivation (pre-AIA § 102(f));
- Whether Eolas's claims are barred in whole or in part by the doctrines of estoppel, prosecution laches, disclaimer, patent misuse, waiver, unclean hands, inequitable conduct, and/or license and exhaustion; and
- Whether any party is entitled to attorneys' fees under 35 U.S.C. § 285 or costs.

## 2. **MOTIONS**

### a. **Prior and Pending Motions<sup>2</sup>**

The following motions were fully briefed and pending before these cases were transferred to this District, and remain pending:

- Motion of Amazon, Google, and Walmart, to Supplement Their Patent Rule 3-3 Invalidity Contentions and Rule 3-4(b) Document Production (Dkt. 203), Eolas's Opposition thereto (Dkt. 206), Defendants' Reply (Dkt. 214), and Eolas's Sur-Reply (Dkt. 219);
- Motion of Amazon, Google, and Walmart, for Leave to File a Supplemental Brief in Support of Their Motion for Leave to Supplement Their Patent Rule 3-3 Invalidity Contentions and Rule 3-4(b) Document Production (Dkt. 241), Eolas's

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<sup>2</sup> Motions related to venue, transfer, or other motions not directly touching on the merits have been omitted.

1 Opposition thereto (Dkt. 243), Defendants' Reply (Dkt. 246), and Eolas's Sur-  
 2 Reply (Dkt. 250); and

- 3 • Motion of Walmart (joined by Amazon and Google) to Compel Previous Litigation  
 4 Documents and Email Production From Eolas Technologies Incorporated (Dkt.  
 5 221; Dkt. 226 (Amazon joining); Dkt. 227 (Google joining)); and Eolas's  
 6 Opposition thereto (Dkt. 231).

7 The Court indicated that all three cases would be referred to a magistrate judge for all discovery  
 8 purposes, including the above three motions. (*See* Dkt. 377.) The Court subsequently referred the  
 9 Amazon case to Magistrate Judge Corley for all discovery purposes. (*See* Dkt. 407.) None of these  
 10 motions have been discussed with Judge Corley, as all matters were stayed during resolution of  
 11 the prosecution bar issues, Defendants' motion for reconsideration as to claim construction, and  
 12 Defendants' motion for summary judgment. The parties welcome resolution of these motions—by  
 13 the Court or Judge Corley. If discovery and these motions will still be referred to Magistrate Judge  
 14 Corley, the parties ask that the Court refer all three cases similarly since the above motions were  
 15 briefed jointly. The parties agree that each of the above-listed motions should be taken up now that  
 16 Defendants' early summary judgment motion has been decided.

17 Since transfer to this District, several motions have been decided:

- 18 • Eolas's Motion to Disqualify Latham & Watkins (Dkt. 253), filed February 28,  
 19 2016, was denied (Dkt. 385);
- 20 • Eolas's Motion for Leave to File a Motion for Reconsideration (Dkt. 391), filed  
 21 September 14, 2017, was denied (Dkt. 396);
- 22 • Amazon's and Google's Motion to Compel Additional Post-July 22, 2014  
 23 Discovery (Dkt. 467), filed September 26, 2018, was denied (Dkt. 492);
- 24 • Amazon's Motion for Order to Show Cause Regarding McKool Smith's Violation  
 25 of Prosecution Bar (Dkt. 262), filed March 2, 2017, was denied (Dkt. 566);

- Defendants’ Motion for Summary Judgment on Obviousness-Type Double Patenting & Preclusion Doctrines (Dkts. 592, 614), filed March 24, 2020, was denied (Dkt. 655); and
- Defendants’ Motion for Limited Reconsideration of Construction of “Interactive-Content Application” (Dkt. 619), filed April 14, 2020, was denied (Dkt. 619).

**b. Anticipated Motions**

The parties anticipate that they may file summary judgment, *Daubert*, and other pre-trial motions following expert discovery. Such motions would be filed in accordance with the Court’s scheduling and other orders.

**1. Eolas’s Statement**

For the reasons discussed below, Eolas anticipates filing a motion to compel Defendants to destroy Eolas’s privileged and work product documents produced as part of the Court’s resolution of Defendants’ already-denied prosecution bar motion—documents that Defendants have refused to destroy notwithstanding the narrow and limited scope of the waiver that related *only* to the resolution of that motion.

Furthermore, Defendants’ suggestion that they may seek or be entitled to *additional* documents (including additional potentially privileged or work product documents) is without merit. Discovery in these cases has been closed for more than four years—and, prior to the close of discovery, Defendants did not timely file a motion seeking the production of any such documents. Indeed, Amazon’s and Google’s Motion to Compel Additional Post-July 22, 2014 Discovery (Dkt. 467)—which presumably covers at least some of the potentially privileged or work product documents that Defendants refer to below—was already denied (Dkt. 492). The Court should promptly and conclusively reject Defendants’ attempt to file additional motions or otherwise reopen discovery, which would result in further delay of these long-pending cases.

**2. Amazon’s, Google’s, and Walmart’s Statement**

As explained in detail below, Defendants believe that given the history of the dispute over prosecution bar-related documents, it would be most efficient to follow the Court’s procedure

1 regarding discovery motions so that the parties may outline the facts and law in detail for the  
 2 Court. In addition to the documents that are already in in Defendants' possession (which  
 3 Defendants have not refused to destroy as Eolas contends but rather contend they fall within the  
 4 scope of the agreed-to waiver), Defendants believe that Eolas has additional documents that have  
 5 not been produced and are relevant to Defendants' defenses related to the prosecution of the '507  
 6 patent, including invalid patent term adjustment, inequitable conduct, and unclean hands. Given  
 7 these document-related disputes, Defendants ask for the opportunity to file a motion to compel  
 8 these not-yet-produced documents in connection with these defenses, as well as the use of the  
 9 documents that have been produced. While Eolas contends such a motion would be procedurally  
 10 improper because discovery has been closed, Defendants would not have been aware of such  
 11 documents during the fact discovery period since it only came to light that Eolas has been  
 12 withholding additional relevant documents as part of the motion practice on the protective order,  
 13 which took place *after* the close of fact discovery.

### 14 **3. DISCOVERY**

#### 15 **a. Eolas's Statement**

16 The district court entered discovery, protective, and ESI orders for this case prior to  
 17 transfer (Dkts. 75, 97-98). Fact discovery has concluded. With limited exceptions related to  
 18 possible additional third party depositions and documents that may be needed if Defendants'  
 19 motion for leave (discussed in "Motions" section) is granted such that additional alleged prior art  
 20 becomes at issue, Eolas does not believe that further fact discovery is necessary or that this Court  
 21 should enter additional discovery, protective, or ESI orders.

22 Notwithstanding the Court's denial of Defendants' prosecution bar motion and the limited  
 23 scope of the waiver related only to the resolution of that issue, Defendants have indicated their  
 24 intention to use these privileged documents to litigate issues related to "patent term adjustment,  
 25 inequitable conduct, and unclean hands." At the time Eolas agreed to voluntarily waive privilege  
 26 regarding these documents, it made clear that the waiver was *expressly limited to resolving the*  
 27 *prosecution bar motion and did not extend to any other issue in the case.* As explained in detail  
 28

1 below, the narrow scope of Eolas's voluntary waiver was subsequently reiterated multiple times  
2 (both by Eolas and Magistrate Judge Corley), conclusively resolving any ambiguity. Because the  
3 prosecution bar motion has been resolved, Defendants Google and Amazon should be ordered to  
4 destroy all of the privileged materials over which Eolas voluntarily waived privilege.

5       Following a back-and-forth discussion with Magistrate Judge Corley and Defendants at the  
6 March 29, 2018 Hearing, Eolas agreed to a "partial" and "circumscribe[d]" disclosure of "the  
7 documents up to July 22nd" on the condition that the limited disclosure would not constitute a  
8 "broader waiver" and the documents would be used "only for the purposes of this [prosecution  
9 bar] motion." March 29, 2018 Hearing Tr. at 24:5, 25:14, 27:22-23, 29:10-17. Magistrate Judge  
10 Corley further indicated that Eolas could allow Defendants to see the disclosed documents with  
11 "no subject matter waiver." *Id.* at 23:5-8. The waiver agreed to at the March 29, 2018 hearing  
12 therefore did not extend beyond the prosecution bar motion.

13       The limited scope of the waiver Eolas agreed to was again confirmed at the April 26, 2018  
14 Hearing before Magistrate Judge Corley. At that hearing, Eolas made clear "that the offer that we  
15 are making to give [McKool Smith's] internal documents is also subject to the condition that  
16 [counsel for Eolas] stated last time, . . . that is it's for purposes of this [prosecution bar] motion ,  
17 because it also could be helpful to [Defendants] with regard to the merits and that's not what we're  
18 talking about here." April 26, 2018 Hearing Tr. at 15:17-23. In response, Magistrate Judge Corley  
19 stated unambiguously that "I understand it's [the agreed waiver] about whether the prosecution bar  
20 was violated." *Id.* at 15:24-25. Counsel for Defendants' then asserted that the waiver extended to a  
21 laundry list of other issues, including (but not limited to), "the patent term extension defense, our  
22 infringement invalidity defenses as they relate to res judicata and collateral estoppel and other  
23 issues, Rule 37 and the like" and further asserted that the documents should not be "constrained  
24 only to deciding whether the bar was violated or not" because "the documents . . . are relevant to  
25 other substantive issues." *Id.* at 16:7-24. Magistrate Judge Corley then remarked:

26       That's fine. But they [Eolas] waived for a limited purpose – and it may be that,  
27 notwithstanding their waiver, the Court would order it could be used for a broader  
28 purpose, but that wouldn't be their agreement, that would be an order.

1 *Id.* at 17:2-6. To the extent there was any ambiguity about the scope of the waiver agreed to at the  
 2 March 29, 2018 Hearing, the April 26, 2018 Hearing conclusively resolved it: the waiver Eolas  
 3 agreed to did not extend beyond the prosecution bar motion and certainly did not extend to “other  
 4 substantive issues” like Defendants’ patent term adjustment and other invalidity defenses.<sup>3</sup> The  
 5 Court’s December 9, 2019 Order confirms this. Dkt. 566 at 3 (“Eolas also agreed to turn over its  
 6 attorney-client privileged communications prior to that date on the condition that those documents  
 7 would be produced for ‘attorney’s eyes only’ review ***and used only for purposes of the motion***  
 8 ***now before the Court*** [i.e., the prosecution bar motion].” (emphasis added)).

9 Consistent with the narrow scope of its voluntary waiver (limited to resolution of the  
 10 prosecution bar motion) discussed at the March 29, 2018 Hearing, Eolas produced the first set of  
 11 privileged documents on the condition that they be “used for the limited purpose” of “resol[ving]  
 12 . . . Amazon’s Motion for an Order to Show Cause (Dkt. 262)”—*i.e.* the prosecution bar motion.  
 13 Dkt. 569-1 (J. Quigley Email to Amazon dated April 6, 2018). Eolas further reiterated that “[a]s  
 14 agreed during the March 29, 2018 hearing, there is no broader subject matter privilege waiver  
 15 based upon this production.” *See id.* Eolas produced these documents to Google with the same  
 16 conditions. *See* Dkt. 569-2 (J. Quigley Email to Google dated April 6, 2018). Similarly, Eolas  
 17 produced the second set of privileged documents to both Amazon and Google on the condition  
 18 that they be “used for the limited purpose” of “resol[ving] . . . Amazon’s Motion for an Order to  
 19 Show Cause (Dkt. 262)” and that “as before and as the parties agreed during the March 29, 2018  
 20 hearing, there is no broader subject matter privilege waiver based upon this production.” Dkt. 569-  
 21 3 (M. Moore Letter to Google and Amazon dated June 15, 2018). Eolas was “entitled to rely” on  
 22 these conditions, “so that it [would] not be unfairly surprised in the future by learning that it  
 23 actually waived more than it bargained for” when it agreed to make its limited disclosure. *See*  
 24 *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003). And Defendants effectively agreed to be

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25  
 26 <sup>3</sup> The September 6, 2018 Hearing Transcript further demonstrates the circumscribed nature of  
 27 Eolas’s agreed waiver. *See* September 6, 2018 Hearing Transcript at 25:3-13 (Magistrate Judge  
 28 Corley denying Walmart’s request for access to the privileged materials related to the “defense of  
 the invalid patent term adjustment” because while “that may be a defense” it is “not a defense I’m  
 adjudicating discovery for now.”); *see also id.* at 25:14-26:22.



1 bound by these conditions when they reviewed these documents: if they did “not wish to be  
2 bound, [they were] free to reject the materials and litigate without them.” *Id.*

3 The Court previously stated that it would speak with Judge Corley about this issue,  
4 including potentially referring the issue to Judge Corley. *See* Feb. 24, 2020 Hearing Transcript at  
5 5:7-7:6. Eolas welcomes resolution of the issue—by the Court or Judge Corley—as promptly as  
6 possible.

7 **b. Amazon’s, Google’s, and Walmart’s Statement**

8 **i. Discovery Taken to Date**

9 Fact discovery is largely complete. If the Court grants the pending Motion to Compel  
10 Previous Litigation Documents and Email Production From Eolas (*supra* Section 2.a), Eolas will  
11 need to produce the requested litigation and email documents. In addition, in a motion filed before  
12 the case was transferred to this Court in 2017, Amazon, Google, and Walmart seek to supplement  
13 their invalidity contentions with additional materials related to the invalidity theories they have  
14 already disclosed. Notably, Amazon and Walmart each included the additional materials in their  
15 invalidity expert’s report, and Eolas responded to this evidence through its own rebuttal report.  
16 Presumably, the same will be true when Google and Eolas exchange expert reports. Expert  
17 depositions of validity experts have not yet occurred.

18 Defendants’ motion for leave to supplement its invalidity contentions is not a basis to  
19 reopen discovery, as Eolas suggests. Defendants’ timely disclosed third party prior art witnesses  
20 who were included in their amended initial disclosures. Not only were these witnesses part of  
21 Defendants’ initial disclosures during the present litigation, but Eolas was already aware of many  
22 of these witnesses from the prior litigation. Yet Eolas never sought to depose any of these  
23 witnesses during fact discovery. These cases were transferred to this District after fact discovery  
24 closed and, aside from the pending discovery motions, there is no good cause to reopen it now.

25 Amazon and Eolas, and Walmart and Eolas, have exchanged opening and rebuttal expert  
26 reports. Amazon, Walmart, and Eolas have deposed some of the designated experts but expert  
27 discovery is not yet complete.  
28

1                   **ii.       Scope of Anticipated Discovery**

2           Google and Eolas have not yet exchanged expert reports or started expert depositions.

3           The parties anticipate the need to begin and finish expert discovery.

4                   **iii.       Use of Prosecution Bar-Related Discovery**

5           The Court previously stated that it would speak with Judge Corley about the issue of using  
6 the prosecution bar-related discovery, including potentially referring the issue to her. *See* February  
7 24, 2020 Hearing Transcript at 5:7-7:6. The history and facts related to this issue are complex, and  
8 therefore, Defendants believe that it would be most efficient to resolve this dispute through the  
9 Court’s procedure regarding discovery motions. Defendants are agreeable to Judge Corley or this  
10 Court resolving this potential motion and dispute.

11           As a summary of Defendants’ position (which Defendants can explain further in a fully  
12 developed motion should the Court request briefing on this issue), Defendants maintain a number  
13 of defenses related to the prosecution of the ’507 patent, including invalid patent term adjustment,  
14 inequitable conduct, and unclean hands. The relevance of the prosecution activities to these  
15 theories was explained during a hearing with Magistrate Judge Corley. (*See* Mar. 29, 2018 Hr’g  
16 Tr. at 30:20-31:16.) Judge Corley recognized that these theories all “related to either, one, the  
17 patent prosecution bar people who reviewed confidential -- participated in the prosecution of the  
18 continuation application; or two, the patent term adjustment theory. It’s related to those two  
19 things. . . . And maybe many theories around those two things.” (*Id.* at 31:3-11.) At that hearing,  
20 Eolas agreed to waive privilege as to “the documents up to July 22nd . . . , and that [the waiver] is  
21 limited to these two issues that Your Honor’s identified” (*id.* at 29:10-17)—namely, “violation of  
22 the Protective Order” and Defendants’ “argument as to the patent term adjustment theory” (*id.* at  
23 27:24-28:3). Despite that clear waiver, Eolas contends that the documents produced may not be so  
24 used. Defendants ask that the Court hold Eolas to the waiver it made and allow Defendants to use  
25 and rely on the materials that Eolas and McKool Smith produced during discovery into the  
26 prosecution bar issues.

Defendants also believe that documents that have not been produced are relevant to these defenses. Defendants ask for the opportunity to file a motion to compel these not-yet-produced documents in connection with these defenses, as well as the use of the documents that have been produced, should the Court determine that Eolas's clear waiver may be withdrawn. Again, while Eolas has added its position to this Joint Case Management Statement in detail above, Defendants believe this matter should be resolved by the Court's motion to compel process, so that Defendants may outline the facts and law in detail.

#### **iv. Settlement and ADR**

While in the Eastern District of Texas, the parties previously agreed on Judge David Folsom as a private mediator. At the August 2, 2017 Case Management Conference, the Court asked the parties to pick a local mediator. The parties will meet and confer regarding a new mediator and agree to try and mediate the respective cases at a date to be determined later by the parties but prior to any hearing on later dispositive motions.

### **4. NARROWING OF ISSUES**

#### **a. Eolas's Statement**

At this time, Eolas does not foresee the parties further narrowing any issues, claims, or defenses. However, the invalidity-related issues would narrow if Defendants' motion for leave to amend their invalidity contentions (discussed in Section 2, *supra*) is denied. As previously stated in the Joint Case Management Statements filed in Case Nos. 4:17-cv-1138-JST and 4:17-cv-3023-JST, Eolas disagrees with Google and Walmart that any further narrowing on the part of Eolas is warranted or necessary. Eolas agrees with Defendants' prior position (Dkt. 569 at 13) that the parties will attempt to reach agreement on various matters that will expedite the presentation of evidence at trial, including stipulations of fact and agreements regarding authenticity and admissibility of documents.

#### **b. Amazon's, Google's, and Walmart's Statement**

Google and Walmart maintain their positions that Eolas should narrow the number of asserted claims and/or the number of accused products.

1 **5. SCHEDULING**

2 **a. Eolas's Statement**

3 Eolas provides its proposed schedule in Attachment A.

4 Given the delay in these cases imposed by Defendants over the last four years—through at  
5 least three time-consuming, allegedly-dispositive, and failed motions—Eolas proposes promptly  
6 moving these cases towards trial. To that end, Eolas's proposed schedule stages the case such that  
7 the Amazon and Walmart cases, which are further along procedurally, do not wait for the Google  
8 case to catch up. Instead, Eolas proposes finishing expert discovery and beginning pre-trial  
9 preparations in the Amazon and Walmart cases while the Google case moves towards serving  
10 expert reports, completing expert discovery, and pre-trial preparations.

11 Defendants' purported justifications for continued delay are unpersuasive. As to the  
12 personal and health related issues of Walmart's non-infringement expert, no delay of months is  
13 warranted. Expert reports were served in this case over four years ago. Walmart's expert was days  
14 away from being deposed at the time of transfer. To the extent Walmart seeks a replacement non-  
15 infringement expert, that expert can adopt, and should be limited to, the prior expert's report and  
16 conclusions. Eolas should not be forced to incur the delay and additional expense associated with  
17 Walmart re-serving new expert reports, from a new expert, where that expert expresses new  
18 opinions and new theories. Other courts, when faced with this issue, have ordered that the  
19 replacement expert be limited to the scope and content of the report served by the original expert.  
20 *See, e.g., In re Northrop Grumman Corp. ERISA Litig.*, No. 06-CV-06213, 2016 WL 6826171, at  
21 \*4 (C.D. Cal. Apr. 7, 2016) (new expert "may not testify in any manner that is contrary to or  
22 inconsistent with" former expert's report); *Park v. CAS Enterprises, Inc.*, No. 08-CV-385, 2009  
23 WL 4057888, at \*3 (S.D. Cal. Nov. 19, 2009) (substitute expert may not "espouse any other  
24 opinions or theories not found in [the original] expert reports" because it would "be both  
25 prejudicial and unduly burdensome to [opposing party]"); *Lincoln Nat. Life Ins. Co. v.*  
26 *Transamerica Fin. Life Ins. Co.*, No. 1:04-CV-396, 2010 WL 3892860, at \*2 (N.D. Ind. Sept. 30,  
27 2010) ("[T]he substitute expert's report and testimony is frequently limited to the subject matter  
28

1 and theories already espoused by the former expert.”). The case cited by Walmart is inapposite. In  
2 *Green v. City & County of San Francisco*, the parties stipulation that defendants could “augment  
3 their expert disclosure” and that the new expert would be limited *only* to the “*the topics* addressed  
4 in [the original] expert disclosure.” No. 10-cv-02649-RS (MEJ), 2015 U.S. Dist. LEXIS 46102, at  
5 \*3 (N.D. Cal. Apr. 8, 2015) (emphasis added). The sole question before the court was whether the  
6 new report violated the parties’ stipulation and the court’s order effectuating the stipulation. Here,  
7 the parties have not already agreed that Walmart can “augment” its expert disclosure or delay  
8 resolution of these cases while it does so. *Green’s* holding is therefore inapplicable.

9 As to personal and health related issues of Amazon’s invalidity expert, Eolas is amenable  
10 to being flexible with the location and timing of his deposition. The parties can surely work to  
11 accommodate the personal schedule of Amazon’s expert to minimize the burden of his deposition,  
12 in light of his personal considerations. To that end, Eolas has agreed to move its proposed expert  
13 discovery cutoff by two weeks (from June 30, 2021 to July 15, 2021) to ensure there is adequate  
14 time for flexibility to accomplish the deposition with the minimal amount of burden. But Eolas  
15 should not be forced to again delay this case for many more months where it seems evident from  
16 Amazon’s own statement that a deposition is indeed possible within the discovery period proposed  
17 by Eolas.

18 Defendants are also incorrect that the case should be further delayed pending resolution of  
19 several motions. Those motions can be resolved in parallel with Eolas’s proposed schedule. None  
20 of the motions are case dispositive, and none justify *de facto* staying the case *again* until they are  
21 resolved. Eolas agreed to stay the case to enable the resolution of at least three time-consuming,  
22 allegedly-dispositive, and failed motions as urged by Defendants. Now that those motions have  
23 been conclusively resolved, it is time to move this case towards resolution, it is not—as Defendants  
24 ask—time to impose *further delays* while the Court resolves the few non-dispositive motions that  
25 were pending at the time of the stay, Eolas’s motion to compel Amazon and Google to destroy  
26 Eolas’s privileged materials, or to enable Defendants to file additional (unnecessary) motions.  
27 Defendants are simply wrong that further delay is not prejudicial to Eolas—delay imposes  
28

1 significant and real costs in the form of lost time, increased litigation expense, and unnecessary  
2 uncertainty.

3 Finally, as to the deadlines in its proposed schedule, Eolas has updated the entries in its  
4 proposed schedule to account for issues, such as pre-trial disclosures, that Defendants seek to  
5 include. Although Eolas based its original proposal on the stipulated schedule from March 2020  
6 (Dkt. 581), Eolas is amenable to adding the sorts of deadlines proposed by Defendants. As to the  
7 *Daubert* motion deadline, one week between the end of expert discovery and filing such motions  
8 is more than adequate. The parties can begin preparing any such motions in advance of an expert's  
9 deposition, and can finalize their motions shortly after any such depositions.

10 **b. Amazon's, Google's, and Walmart's Statement**

11 Defendants provide their proposed dates in Attachment B.

12 Amazon and Walmart oppose proceeding with the Amazon and Walmart cases on one  
13 schedule and Google's case on another schedule.<sup>4</sup> As Walmart has discussed with Eolas during the  
14 meet and confer process, one of its experts is facing health issues and has informed Walmart that  
15 he is no longer available. Walmart has identified a replacement non-infringement expert and  
16 hopes to have him fully engaged and disclosed to Eolas in the near future. While Walmart expects  
17 that its replacement expert's non-infringement report will be similar to its prior non-infringement  
18 report, Walmart's replacement expert should not be required to "parrot" the earlier report as "such  
19 an approach would be inconsistent with the requirements that an appointed expert is to be  
20 independent and offer his own opinions based on his experience and expertise in the subject  
21 matter." *Green v. City & Cty. of S.F.*, No. 10-cv-02649-RS (MEJ), 2015 U.S. Dist. LEXIS 46102,  
22 at \*9 (N.D. Cal. Apr. 8, 2015) (citing *Palatkevich v. Choupak*, 2014 U.S. Dist. LEXIS 153867,  
23 (S.D.N.Y. Oct. 21, 2014)). Furthermore, given that Walmart's prior expert was not deposed before  
24 the case was transferred, Walmart's replacement expert will be required to review and understand  
25 all the underlying materials associated with Eolas's infringement allegations in preparation for his

26 \_\_\_\_\_  
27 <sup>4</sup> Google joins with Amazon and Walmart on their request for the schedule in Attachment B.  
28 However, Google would also not be opposed to being on a slightly later schedule, if that is what  
the Court prefers, so long as Google's dates are in alignment with the dates in Attachment B.

1 deposition in this case even if he were required to parrot the prior report. This is no small task  
2 given the breadth of Eolas's allegations and the number of Walmart features alleged to infringe,  
3 and defendants' requested schedule properly accounts for this. And Amazon's invalidity expert  
4 has a personal health situation with a member of his immediate family that currently makes  
5 depositions logistically difficult, and so allowing for his deposition to take place in the fall would  
6 allow more time for him to deal with that situation. And while Amazon appreciates Eolas's offer  
7 of flexibility with respect to Amazon's invalidity expert, it does not fully address the current  
8 difficulties with the expert's situation.

9 Further, Defendants believe that they can make use of the next few months by having  
10 Judge Corley resolve the three pending discovery motions, which may lead to additional discovery  
11 that could be considered by the experts, before proceeding with expert depositions. And, as  
12 indicated above, there may be cross-motions relating to documents Eolas produced as part of the  
13 prosecution bar issue.

14 Defendants also disagree with Eolas's proposed schedule. Google's lead counsel and other  
15 counsel of record have trials that are currently scheduled the week of April 21, which is when  
16 Eolas has proposed the hearing for dispositive motions. Further, Eolas's proposed schedule only  
17 provides the parties with one week to file *Daubert* motions after the close of expert discovery and  
18 unnecessarily condenses the time necessary to complete important pretrial disclosures, such as  
19 deposition designations and witness lists or trial submissions, such as jury instructions, verdict  
20 forms, and the pretrial order, all of which take a substantial amount of time and effort for the  
21 parties to complete. Defendants' proposed schedule, which accounts for these important deadlines  
22 and provides the necessary time needed for the parties to complete these tasks, only shifts Eolas's  
23 proposed schedule by a few months.

24 A shift in the schedule by a few months to provide the parties sufficient time between  
25 deadlines to properly prepare its respective case and to prepare for trial will not prejudice Eolas.  
26 The '507 patent expired 3.5 years ago on August 24, 2017, so any damages owed to Eolas ended  
27 on August 24, 2017—Eolas is not suffering from any continued alleged damages and there is no  
28

1 possibility of injunctive relief. Eolas concludes without explanation that a delay would lead to  
2 “costs in the form of lost time, increased litigation expense, and unnecessary uncertainty,” but  
3 ignores that Defendants’ schedule and synchronization of the cases would actually reduce costs  
4 and promote efficiency, especially if the cases were consolidated for invalidity purposes.

5 **6. TRIAL**

6 **a. Eolas’s Statement**

7 Eolas has demanded that the case be tried by jury. Eolas understands that the Court holds  
8 trial Monday through Thursday from 8:30 a.m. to 1:30 p.m. Given this, Eolas expects that each  
9 trial (one per defendant) will last 7-8 court days.

10 Eolas agrees with the Court’s prior assessment (at the August 2, 2017 case management  
11 conference) that a bifurcated invalidity trial is inappropriate here. Instead of responding point-by-  
12 point to Defendants’ arguments below, Eolas only points out that the *Adobe* case was one  
13 consolidated case (not three separate cases as here), in a different jurisdiction (that Defendants  
14 sought refuge from in these cases), involving a single defense expert (compared to three separate  
15 validity experts here), and involving the same prior art for each defendant (Defendants each use  
16 different prior art here). Eolas is prepared to discuss this issue in more detail at the upcoming case  
17 management conference.

18 **b. Amazon’s, Google’s, and Walmart’s Statement**

19 Each of Amazon, Google, and Walmart requests trial by jury for all issues so triable. The  
20 length of the trial will depend on the resolution of the parties’ pretrial motions and the ability to  
21 narrow the issues. Amazon presently believes that a ten-day trial would be sufficient if all issues  
22 are tried together. Google and Walmart presently believe that if Eolas narrows its asserted claims  
23 and accused products (*see* Dkt. 79 in Case No. 4:17-cv-1138-JST; Dkt. 86 in Case No. 4:17-cv-  
24 3023-JST), a 7-8 day trial for each is reasonable.

25 If the Court desires to discuss trial scheduling at the Case Management Conference,  
26 Defendants will be prepared to do so. Although the court indicated at the August 2, 2017 Case  
27 Management Conference that it did not favor a bifurcated invalidity trial and that it intends to hold  
28



1 three separate trials, Defendants again reiterate that it would be appropriate to bifurcate the  
2 contested issues of invalidity of the asserted claims of the '507 patent and hold a joint trial on  
3 invalidity with all defendants separately from the other issues to be tried. This procedure was used  
4 in *Eolas Technologies Inc. v. Adobe Sys. Inc., et al.*, No. 09-cv-446 (E.D. Tex.). There, Eolas  
5 agreed to a joint trial on invalidity, stating "it is unfair to subject the patent to multiple trials on  
6 invalidity" and "in terms of judicial economy, it does not make sense to have three different juries  
7 considering exactly the same issues." Jan. 19, 2012 Trial Plan Tr. at 3:21-4:3, 8:12-14. In that  
8 earlier case, the jury trial on invalidity issues relating to the great-grandparent and grandparent  
9 patents to the '507 patent in this case resulted in a finding of invalidity. The U.S. Court of Appeals  
10 for the Federal Circuit affirmed and that case was resolved without further trials against multiple  
11 defendants.

12 Eolas's complaints about a consolidated invalidity trial are easily addressed. The Court  
13 has the authority to consolidate the three cases on a common issue like invalidity, and the  
14 jurisdiction is irrelevant to the question of whether consolidation is appropriate. And as with  
15 Defendants' joint invalidity contentions and motion for summary judgment (which relied on a  
16 single expert for all Defendants), Defendants will work together to address any potential  
17 redundancies, which in any case will be minimal. For example, the Defendants' bases for  
18 invalidity (including prior art) are largely coextensive. And a consolidated trial would best  
19 address Eolas's concerns about "costs in the form of lost time, increased litigation expense, and  
20 unnecessary uncertainty," as it would be more efficient, reduce expenses and uncertainties, and  
21 potentially save time, to have a consolidated trial.

22 In addition to gains on judicial economy, a bifurcated trial with invalidity issues tried  
23 separately from other issues would result in minimizing third party witness time and expense.  
24 Defendants all intend to call third party prior art witnesses to support their invalidity defense and  
25 rely on substantially the same prior art and invalidity defenses. Indeed, Defendants served their  
26 invalidity contentions in the case jointly. If the trials are not bifurcated, this would result in the  
27 Defendants calling at least some of the same prior art witnesses for each Defendants' respective  
28

1 trial. Many of these witnesses are advanced in age and remote from the jurisdiction. There is also a  
2 risk that the prior art witnesses would not agree to testify in three separate trials. For example, Sir  
3 Tim Berners-Lee might testify about the development of the World Wide Web and the HTML and  
4 HTTP protocols it uses, in relation to some of Defendants' prior art invalidity cases. Sir Berners-  
5 Lee, who testified in the 2012 combined invalidity trial in Marshall, Texas, resides in the United  
6 Kingdom, and would be greatly inconvenienced to have to provide testimony on more than one  
7 occasion. Given the pandemic, the age of these witnesses, and the time and expense to prepare and  
8 attend trial, it would be an incredible burden to place on these third party witnesses. Accordingly,  
9 Amazon, Google, and Walmart respectfully suggest this Court follow the same bifurcated trial  
10 procedure here as was used in *Eolas Technologies Inc. v. Adobe Sys. Inc., et al.*, No. 09-cv-446  
11 (E.D. Tex.).

1 DATED: June 1, 2021

Respectfully submitted,

2 By /s/ James E. Quigley

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**ATTESTATION**

I, James E. Quigley, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

DATED: June 1, 2021

/s/ James E. Quigley  
James E. Quigley

**ATTACHMENT A****EOLAS'S PROPOSED SCHEDULE**

<b>DEADLINE DESCRIPTION</b>	<b>AMAZON/WALMART DATE</b>	<b>GOOGLE DATE</b>
Defendants to provide updated financial information	June 10, 2021	June 10, 2021
Opening Expert Reports	N/A	August 26, 2021
Rebuttal Expert Reports	N/A	September 30, 2021
Expert Discovery Cutoff	July 15, 2021	October 21, 2021
<i>Daubert</i> Motions & Motions to Strike	July 22, 2021	October 28, 2021
Oppositions to <i>Daubert</i> Motions & Motions to Strike	August 12, 2021	November 18, 2021
Replies to <i>Daubert</i> Motions & Motions to Strike	August 19, 2021	December 9, 2021
Hearing on <i>Daubert</i> Motions & Motions to Strike	August 26, 2021	January 6, 2022
Dispositive Motions	September 23, 2021	February 10, 2022
Oppositions to Dispositive Motions	October 21, 2021	March 10, 2022
Replies to Dispositive Motions	November 4, 2021	March 24, 2022

<b>DEADLINE DESCRIPTION</b>	<b>AMAZON/WALMART DATE</b>	<b>GOOGLE DATE</b>
Hearing on Dispositive Motions	November 18 2021	April 21, 2022
Mediation	December 2, 2021	April 28, 2022
Exchange Pretrial Disclosures (Witness List, Deposition Designations, Exhibits, and Exhibit List) by the Party with the Burden of Proof	December 15, 2021	May 12, 2022
Exchange Objections to Pretrial Disclosures; Exchange Rebuttal Pretrial Disclosures	January 5, 2022	June 2, 2022
Exchange Objections to Rebuttal Pretrial Disclosures	January 12, 2022	June 9, 2022
Motions <i>in limine</i>	January 19, 2022	June 16, 2022
Oppositions to Motions <i>in limine</i>	February 3, 2022	June 30, 2022
Pretrial Conference Statement, Joint Proposed Jury Instructions, Joint Proposed Verdict Form, Juror Questionnaire, Updated Exhibit Lists, and Updated Witness Lists	February 10, 2022	July 7, 2022
Pretrial Conference	February 18, 2022	July 15, 2022
Trials	TBD	TBD



**ATTACHMENT B****DEFENDANTS' PROPOSED SCHEDULE**

<b>DEADLINE DESCRIPTION</b>	<b>DATES PROPOSED BY DEFENDANTS</b>
Defendants to provide updated financial information	June 30, 2021
Deadline to file any additional discovery motions as contemplated in this JCMS	June 30, 2021
Google & Eolas Opening Expert Reports and any Substitute Walmart Expert Reports	August 26, 2021
Expert Discovery Period Opens as to Eolas-Amazon and Eolas-Walmart	September 20, 2021
Google & Eolas Rebuttal Expert Reports	October 7, 2021
Expert Discovery Period Opens as to Eolas-Google	October 10, 2021
Expert Discovery Cutoff for all cases	October 28, 2021
<i>Daubert</i> Motions & Motions to Strike	November 18, 2021
Oppositions to <i>Daubert</i> Motions & Motions to Strike	December 9, 2021
Replies to <i>Daubert</i> Motions & Motions to Strike	December 22, 2021
Hearing on <i>Daubert</i> Motions & Motions to Strike	January 6, 2022

<b>DEADLINE DESCRIPTION</b>	<b>DATES PROPOSED BY DEFENDANTS</b>
Dispositive Motions	February 10, 2022
Oppositions to Dispositive Motions	March 10, 2022
Replies to Dispositive Motions	March 31, 2022
Mediation	May 12, 2022
Hearing on Dispositive Motions	May 19, 2022
Exchange Pretrial Disclosures (Witness List, Deposition Designations, and Exhibit List) by the Party with the Burden of Proof	June 22, 2022
Exchange of Exhibits	June 29, 2022
Exchange Objections to Pretrial Disclosures; Exchange Rebuttal Pretrial Disclosures	July 20, 2022
Exchange Objections to Rebuttal Pretrial Disclosures	August 3, 2022
Motions <i>in limine</i>	August 17, 2022
Oppositions to Motions <i>in limine</i>	September 7, 2022
Pretrial Conference Statement, Joint Proposed Jury Instructions, Joint Proposed Verdict Form, Juror Questionnaire, Updated	October 6, 2022

<b>DEADLINE DESCRIPTION</b>	<b>DATES PROPOSED BY DEFENDANTS</b>
Exhibit Lists, and Updated Witness Lists	
Pretrial Conference	October 28, 2022
Joint Invalidity Trial	TBD
Trials	TBD